

IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~1403~~ 231

THE SUPERIOR OIL COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, PUBLIC SERVICE COM-
 MISSION OF THE STATE OF NEW YORK and LONG
 ISLAND LIGHTING COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS FOR
 THE DISTRICT OF COLUMBIA CIRCUIT

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The Superior Oil Company herewith petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in Nos. 19796, et al., on February 7, 1967.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F. 2d 816 (1967). Said opinion is also set forth in full in the Petition for Writ of Certiorari of Shell Oil Company (Appendix A, pages 13-43) assigned case No. 1328 in this October Term 1966. It also appears in Appendix B, pages 1a-30a of the Petition for Writ of Certiorari of Skelly Oil Company, et al., assigned case No. 1371, October Term 1966. Such Appendices are incorporated herein. The opinion and order of the Federal Power Commission¹ (Hawkins Appendix 277-309)² are reported at 34 FPC 897 (1965) and the Commission opinion on rehearing is reported at 34 FPC 1330 (Hawkins Appendix 315-321).

JURISDICTION

The judgment of the Court of Appeals in Nos. 19796, 19800, 19919, 19941 and 19957, consolidated by the Court below, was entered on February 7, 1967. An application for an extension of time in which to file this Petition of Writ of Certiorari was granted by Chief Justice Earl Warren extending the time for filing to and including June 8, 1967. This Petition is therefore timely filed and the jurisdiction of this Court

¹ H. L. Hawkins & H. L. Hawkins, Jr. (Operator), et al., Docket Nos. G-18077, et al., Opinion 475.

² No. 19796 *Public Service Commission of the State of New York v. F.P.C.*

No. 19800 *Public Service Commission of the State of New York v. F.P.C.*

No. 19919 *Long Island Lighting Company v. F.P.C.*

No. 19941 *Continental Oil Company v. F.P.C.*

No. 19957 *The Superior Oil Company v. F.P.C.*

is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b) 52 Stat. 831 (1938).

QUESTIONS PRESENTED

The Court below recognized that the concept of an "in-line" price is an artificial one created by this Court in *Atlantic Refining Company v. Public Service Commission of New York* (CATCO), 360 U.S. 378 (1959) and subsequent related interpretive decisions of the Commission and courts of appeal. The Commission below issued a number of permanent certificates of public convenience and necessity for the sale of natural gas at a price which it believed to be "in-line" within the meaning of CATCO. The Commission in such determination of the "in-line" price relied primarily on previously issued permanently certificated sales. The Commission also expressly took into consideration, but to a lesser degree, the contract and temporary certificate prices of comparable sales in arriving at its "in-line" price determination. However, the District of Columbia Circuit reversed the Commission and held that, where permanently certificated prices are available, only selected past permanent certificate prices may be relied upon for a Commission determination of an in-line price since these were the only prices over which the Commission had exercised careful control. It further held that the selected permanent prices might be relied upon even though certificated under standards later changed by the courts and there need not be in the proceeding below a reexamination of such prices at this time. Finally, the Court held that the Commission may exercise its discretion and ignore or discount, again without any reexamination, certain permanent certificate prices on the bare statement that such per-

manent sales would have been set aside under current judicial standards but for a procedural defect in the seeking of judicial review.

Questions presented are:

1. Is the Commission, in establishing the several "in-line" prices, obligated to disregard current conditions in the areas which might affect the price levels, when such current conditions are reflected by certain high-priced final permanent certificates, temporary certificate prices, contract prices and the Commission's price guidelines promulgated in its Statement of General Policy 61-1?

2. Does the Commission have discretion to determine an "in-line" price after elimination of certain final permanently certificated prices and rely entirely upon prices in those final permanent certificates remaining *without reexamining either the prices eliminated or those relied upon by the same standards?*

3. Does the Commission have the discretion to determine an "in-line" price in this proceeding on the basis of a weighted average price which includes all permanent certificates below 14 cents per Mcf when in prior proceedings the weighted average price used to determine the "in-line" price was based only on permanent certificate prices at or above 14 cents per Mcf?

4. Is it a requirement of producer applicants, or even the Federal Power Commission itself, to show in a Section 7 proceeding that the gas to be sold will (a) not eventually be used by consumers in an economically inferior way, (b) not be wasted through an oversupply situation and (c) be needed by the public?

STATUTE INVOLVED

The statute involved is Section 7 of the Natural Gas Act, June 21, 1938, 52 Stat. 821-833, as amended. 15 U.S.C. 717-717w. Sections 7(c) and 7(e), 15 U.S.C. 717f(c) and (e) are printed at pages 2 and 3 of Shell's Petition of Writ of Certiorari No. 1328 this Term and incorporated herein.

STATEMENT

The instant proceedings in the Court below involved separate proceedings before the Commission under Section 7 of the Natural Gas Act.³ The Commission issued conditioned permanent certificates for numerous sales by independent natural gas producers for the separate pricing districts involved. Texas Railroad Commission District No. 2 on the Texas Gulf Coast is involved in the *Sinclair* proceeding and Texas Railroad Commission District No. 3, also on the Texas Gulf Coast, is involved in the *Hawkins* proceeding. Petitioner in the *Hawkins* proceeding contended that its contract price of 17.5 cents per Mcf was "in-line" when considered with the line of prices permanently certificated in other sales in District No. 3 reasonably contemporaneous in time and otherwise comparable to Petitioner's interstate sale.

³ The decision of the D. C. Circuit below involved two Commission orders based upon separate administrative records, the relative parts of which were reproduced in separate joint appendices. H. L. Hawkins and H. L. Hawkins, Jr., 34 FPC 897, Opinion No. 475 reviewed in CADC Nos. 19796 and 19957 is referred to as "Hawkins Appendix —." Similarly, Sinclair Oil and Gas Co., 34 FPC 930, Commission Opinion 476 reviewed in CADC No. 19800, 19919 and 19941 will be referred to as "Sinclair Appendix —." Copies of the record have been previously filed by Shell Oil Co. in No. 1328.

For District No. 3, the Commission determined that the "in-line" price was 16 cents per Mcf for sales prior to September 28, 1960 and 17 cents per Mcf subsequent to that date. For District No. 2, the *Sinclair* proceeding, the Commission determined that the "in-line" price to be 15 cents per Mcf for sales prior to September 28, 1960 and 16 cents per Mcf subsequent to that date. The Commission determinations were based on a record which included a contract price study of all temporary and permanent certificate sales made in this area since 1954, intrastate market studies and testimony as to the impact of the Statement of General Policy 61-1 on gas prices in this area. Various producers also offered other cost and economic studies to support their contract prices stated in the applications to the Commission but such testimony was excluded by the Commission under the precedent of the *Skelly Oil Company* case, Opinion 362, 28 FPC 401. Such exclusionary ruling received this Court's approval in *U.G.I. v. Callery Properties Inc.*, 382 U.S. 223 (1965).

The "in-line" price of only 16 cents per Mcf for District No. 3 for the period prior to the issuance of Statement of General Policy was based in large part on a weighted average price determination which excluded some nine permanently certificated sales, no longer subject to court review, at a 20 cent price level which the Commission stated would admittedly "have a strong effect on the weighted average price of 15.16 cents per Mcf." However, the Commission, with the Court below affirming, stated that such prices should be discounted as was done in *Texaco Seaboard*⁴ be-

⁴ *Texaco Seaboard*, Opinion 383, 29 FPC 593 (1963). No court review was sought due to settlement between the parties.

cause six of the nine sales were involved in *Trunkline Gas Company, et al.*, 21 FPC 704 (1959) in which New York's Petition for Review was dismissed by the Court of Appeals because not timely filed. Shell Petition 1328, Appendix A, page 37; Skelly Petition 1371, Appendix B, pages 27a-28a. The Court below, concurring in the elimination of the nine 20 cent permanent prices from the determination of the price line, in addition, rejected the argument of the New York Public Service Commission that certain pre-Policy Statement "in-line" prices in District No. 3 were tainted by similar prices permanently certificated in the 1956-57 period and as such *CATCO* would consider such prices to be incorrectly certificated and not useable in an "in-line" price determination. The Court justified such Commission discretion in considering these 1956-57 prices by pointing out that although it is sometimes wise to reexamine certificated prices, any such requirement would render hearings under Section 7 without end. Shell Petition, Appendix A, page 26; Skelly Appendix B, page 27a. The Court erroneously held that while the Commission is not required to reexamine certificated prices, it is permitted so to do and may ignore such prices if it has good reason to do so. Under the guise of Commission discretion, the Court not only affirmed the Commission's inclusion of the 1956-57 permanent certificate prices attacked by the New York Public Service Commission and other non-comparable 14¢ permanent certificates in the price line determination but also approved the discounting, without quantification, of the nine 20 cent permanent certificate sales on the raw allegation that these particular sales would have been set aside if judicial review had been timely sought. The Court held that such

a statement was an adequate ground without the requirement of any reexamination for such disregard and discounting in the determination of the weighted average price.

Eastern distributors have selectively intervened in certificate proceedings where the contract price level or the price stated in the producer application was above the level deemed acceptable to them. By such tactic, the obtaining of a permanent certificate by an abridged proceeding was denied and any gas flowing under a temporary certificate pending a full hearing on the application was alleged by the distributors to be "suspect."⁵ The Commission, in order to determine the present or future public convenience and necessity price for the instant certificates, had attempted to reflect in said multiple prices the current conditions of the industry as required by the 9th Circuit decision in *U.G.I. v. F.P.C.*, *supra*. The Commission, in its analysis, considered not only the improperly selected permanent certificate prices but attributed some weight, although not primary consideration, to contract prices as well as prices under temporary certificates since in their opinion they showed economic trends in the area (Hawkins Appendix 281-285, 34 FPC 900-902). The Court held that the Commission's guideline price levels should be given no weight whatsoever in determining the "in-line" price. Further, prices under temporary certificates and contract prices should not be used because they are suspect and are subject to change at a later date, Shell Petition No. 1328, Appendix A, pages 32-33; Skelly Petition No. 1371, Appendix B, pages 22a-23a.

⁵ *U.G.I. v. F.P.C.*, 283 F. 2d 817 (9CCA 1960).

The Court also held that the Commission opinion was in error on the question of the public need for gas. The Court held the Commission must consider market demand for the gas, as well as considerations of conservation and prevention of waste. The Commission was held to be obligated to consider reasons why there is or is not a public need for the gas and such decision must be made "before it grants a permanent certificate to a producer."⁶ If the end use of such sale to a consumer will be, in the Commission's view, economically inferior, then the sale should not be certificated. The Commission, the Court below held, if it is to properly perform such functions, must consider "all alternative uses." Shell Petition No. 1328, Appendix A; pages 20-23; Skelly Petition No. 1371, pages 10a-13a.

REASONS FOR GRANTING THE WRIT

This case directly involves the proper method and procedure to be employed in the determination of an "in-line" price. It is of paramount importance to future Commission determinations under the Natural Gas Act and to all independent producers of gas subject to said Act. The acknowledged "artificiality" of the "in-line" pricing concept as announced by this Court in *CATCO, supra*, when considered with the subsequent decision of this Court in *U.G.I. v. Callery Properties, Inc., et al.*, 382 U.S. 223 (1965), which held that the Commission may properly determine and condition a certificate application to the "in-line" price without consideration of any other evidence than field price studies, makes clear the overwhelming sig-

⁶ Shell Petition No. 1328, Appendix A, pages 23, 24; Skelly Petition No. 1371, Appendix B, page 13a.

nificance of a proper and uniform method for the determination of the "in-line" price to the gas-producing industry.

The effect of the Commission decision and its affirmation by the Court below is to give the Commission unbridled discretion to include or exclude prices which it considers in the determination of an "in-line" price on the mere naked assertion, unsupported by reason or fact, that the price result previously reached in a permanent certificate proceeding would not be the same on current reconsideration. This is done without any examination of the facts or circumstances in the prior record. Inconsistently, the Court below in the same proceeding affirmed the Commission discretion to consider and rely on other prices, also permanently certificated and no longer subject to review, again without considering the facts and circumstances in those records. The Commission on one hand says that one set of permanent certificate prices is wrong and should be ignored or discounted and then in the next paragraph states that other groups of permanent certificate prices should be fully considered without the Commission supplying any objective reason for their inclusion or exclusion. If final permanent certificate prices are to be properly ignored and such techniques affirmed by the courts on review, it must be a requisite that the Commission show why the prices relied on in the price line determination are not similarly subject to the same infirmity.

The Natural Gas Act does not delegate to the Commission unlimited powers to select prices it believes to be proper for given periods of time without further legal substantiation or factual reasons developed on

the record. It is not acceptable for the Commission to state that it has "considered" or "given some weight" and then include or exclude such certificated prices. The approval by this Court of such Commission techniques on judicial review affirming such techniques allows the Commission to make a mockery of the Natural Gas Act.

The Court of Appeals decision below is in conflict with the Court of Appeals decision of the 10th Circuit in *Sunray DX Oil Co. v. F.P.C.*, 370 F. 2d 181 (10CCA 1966). That Court held that the Commission has the power and obligation to consider current conditions in the industry by giving some effect to contract prices, temporary certificate prices, and the impact of the Statement of General Policy. The Commission should obtain a balance between the interests of consumer and producer and can do so by looking to prices in temporary and permanent certificates which reflect current conditions in the market. The very careful review by the Commission in issuing temporary certificates with price conditions attached, as well as the full Section 7 hearings, bears out the Commission effort to comply with the U.G.I. Ninth Circuit case, as well as the *CATCO* and *Callery* Supreme Court decisions. The Tenth Circuit recognized the Commission discretion to look at factors other than its own past permanent certificate prices in determining a price line that would reflect changing current conditions in the area. The approval of this Commission technique by the Tenth Circuit is contrary to the D. C. Circuit holding that effectively wipes out Section 7 of the Natural Gas Act once an "in-line" price is determined for a particular area.

The refusal by the Court below to allow the Commission to consider temporary certificate prices, all permanent certificate prices now final, and contract prices, effectively rolls back prices to levels in effect in the late 1950's which have no current relevancy to gas being delivered under applications in the mid and late 1960's. Such a court holding abdicates the certificate pricing function to the distribution companies. The use of the suspect price doctrine and the active intervention of distributors creates "in-line" prices at such low levels that the Supreme Court decision in the *CATCO* and *Callery* cases is frustrated.⁷

Further, the decision of the Court below is also in conflict with the May 24, 1967 decision of the U. S. Court of Appeals for the Fifth Circuit⁸ wherein the Court upheld the Commission technique for determining the "in-line" price for Texas Railroad District No. 4, including consideration of prices issued under temporary certificates. That Court stated that prices under temporary certificates do reflect current conditions and justify advancing the "in-line" price for the period prior to the Statement of General Policy to a higher level for the period subsequent to the Statement of General Policy:

"... we align ourselves with the Tenth Circuit's *Sunray DX* and the Ninth Circuit's holding that '... the 'line' referred to in *Catco* may properly be referenced to relevant existing producer prices

⁷ Petitions for certiorari challenging the ruling of the Tenth Circuit have been filed this Term by several distribution companies (*U.G.I. v. Sunray DX*, No. 1134 this Term, and *Brooklyn Union Gas Company v. F.P.C.*, No. 1134).

⁸ *Continental Oil Company, et al. v. F.P.C., et al.*, Nos. 23188, et al., decided May 24, 1967, — F. 2d — (5 CCA 1967).

under which substantive amounts of natural gas move in interstate commerce . . . ' U.G.I. v. Federal Power Commission, 9 Cir., 1960, 283 F. 2d 817.' at page 30 of the slip opinion.

The D. C. Circuit decision, then, is in conflict, not only with the Tenth Circuit but also the Fifth Circuit, as to the proper ingredients of an "in-line" price determination by the Commission and the necessary record that justifies a price line shift in the "in-line" price.

The Public Service Commission of the State of New York on review was successful in having the D. C. Circuit reverse the Commission on the issue of the producers' obligation to show a public need for the gas before permanent certification of the sale to an interstate pipeline. The Court's holding below that the Commission in processing a producer's application must determine whether or not the gas will be used in an economically inferior way and that it must consider all alternative uses is in direct conflict with the Fifth Circuit decision referred to above.⁹ The Fifth Circuit rejected the distributor argument on the issue of public need. The Fifth Circuit held that the tremendous number of issues and evidence required to make such a finding was not consistent with the *U.G.I. v. Callery* Supreme Court decision that restricted narrowly the evidence necessary and proper for a determination of the "in-line" price. Further, the Fifth Circuit held, contrary to the D. C. Circuit, that the determination of the need issue in a producer's Section 7 proceeding constituted a collateral attack on a pipeline certificate case, as well as unduly enlarged the

⁹ *Continental Oil Co., et al. v. F.P.C., et al., supra.*

scope of the proceeding because of the necessary intervention of pipelines in the producer's case:

"To force a general consideration of need in Section 7 proceedings would force consideration of that type of market evidence whose exclusion *Callery* specifically sanctioned on the price issue. *California Oil Company, Western Division v. Federal Power Commission*, 10 Cir., 1963, 315 F. 2d 652; *Texaco, Inc. v. Federal Power Commission*, 5 Cir., 1961, 290 F. 2d 149." at page 31 of the slip opinion.

Such holding, then, by the Fifth Circuit is directly contrary to the D. C. Circuit below and also requires this Court's resolution.

CONCLUSION

For the reasons detailed above and the presence of a conflict between the Court below and the supporting Fifth and Tenth Circuit decisions on the issue of the proper determination of the "in-line" price and the issue of in what proceeding and how the public need for gas is shown, the resolution of this Court is required.

Respectfully submitted,

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